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June 4, 2018

David J. Smith, Clerk of Court  
U.S. Court of Appeals  
for the Eleventh Circuit  
56 Forsyth St. N.W.  
Atlanta, GA 30303

Re: *Cowabunga, Inc. v. NLRB*  
Case Nos. 16-10932 & 16-11391

Dear Mr. Smith:

Pursuant to the Court's May 23, 2018 Order in the above-referenced case, Petitioner Cowabunga, Inc. hereby submits this letter brief to address the effects of the United States Supreme Court's decision in *Epic Systems Corp. v. Lewis*, 584 U.S. \_\_\_, No. 16-285 (May 21, 2018), on the issues presented. Please note that, pursuant to an unopposed motion filed by the National Labor Relations Board ("the Board") on June 1, 2018, the Board has requested that the Court grant Petitioner's petition for review as to the class waiver issue, and remand the case as to the separate issue of whether the agreement can be reasonably construed as preventing employees from filing unfair labor practice charges. Petitioner does not oppose that motion; however, pursuant to the Court's order, Petitioner has elected to file this letter brief per the Court's request while that motion is pending.

As explained below, the Supreme Court's decision is dispositive of the class action waiver issue and the issue of whether the arbitration agreement would be reasonably read to prohibit the filing of unfair labor practice charges with the Board.

**Class Action Waiver:** In *Epic Systems*, the Supreme Court held that class and collective action waivers in employment arbitration agreements do not violate the National Labor Relations Act ("NLRA") and must be enforced according to their terms under the Federal Arbitration Act ("FAA"). In reaching this holding, the Supreme Court found that neither the FAA's savings clause nor the NLRA suggested otherwise. Cowabunga specifically advanced these arguments in its initial and reply briefs, as well as at oral argument. (*See* Initial Brief, pp. 11-24, 26-27; Reply Brief, pp. 2-15).

Given the Supreme Court's decision that class and collective action waivers in employment arbitration agreements are lawful and enforceable, the Court should grant Cowabunga's petition for review and deny the Board's cross-application for enforcement of that aspect of the Board's order finding Cowabunga's arbitration agreement unlawful.

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**Prohibiting the Filing of ULP Charges:** Petitioner's argument on this issue has been fully stated in prior briefing. *Epic Systems* bolsters that position in that it confirms the FAA controls and arbitration agreements should be enforced as written. Regardless, as the Board notes in its most recent motion, at a minimum the case should be remanded to the Board for further consideration in light of recent Board law developments regarding the standard for evaluating workplace rule language.

Sincerely,

s/Reyburn W. Lominack, III

Reyburn W. Lominack III

Partner

For FISHER & PHILLIPS LLP

cc: All Counsel (via CM/ECF)